SUPREME COURT, U. S.
FEB 28 1967
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 1053

THE FIRESTONE TIRE & RUBBER COMPANY, *Petitioner,*

v.

THE GENERAL TIRE & RUBBER COMPANY and THE HONORABLE R. DORSEY WATKINS, United States District Judge for the District of Maryland,

*Respondents.*

## PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

EDWARD S. IRONS
1000 Connecticut Avenue
Washington, D. C.
*Attorney for Petitioner*

*Of Counsel:*

STANLEY M. CLARK
1200 Firestone Parkway
Akron, Ohio

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 1053

THE FIRESTONE TIRE & RUBBER COMPANY, *Petitioner*,

v.

THE GENERAL TIRE & RUBBER COMPANY and THE HONORABLE R. DORSEY WATKINS, United States District Judge for the District of Maryland,

*Respondents.*

## PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

"Respondent's Brief in Opposition" demonstrates compelling reasons for the grant of certiorari.

1. Respondent's references to the Fourth Circuit's power of administration and supervision over courts within that Circuit do nothing to counteract the conflict between the exercise of such power in the context of this case and the principles established in *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240. Like all other powers, supervisory power must be exercised within the limits prescribed by law, and *Platt* has established the limits beyond which the Fourth Circuit may not go in supervising transfers of cases in district courts. And nothing in *Platt* suggests that its princi-

ples are limited to the transfer of federal criminal prosecutions.

Certainly the general desirability of avoiding multiple and wasteful litigation in federal courts gives the Fourth Circuit no basis for ignoring the *Platt* limitations on its power. Such authorities as this Court's opinion in *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, 342 U.S. 180, and the Second Circuit's action in *Hammett* v. *Warner Bros. Pictures, Inc.*, 176 F. 2d 145, both relied upon by the court below, supply no answers to the problem whether a federal appellate court can formulate and then execute its own *de novo* standards of transfer; both *Kerotest* and *Hammett* dealt with enjoining or dismissing before trial the prosecution of a wasteful identical suit rather than with the *de novo* transfer of one suit long after trial had commenced.

Moreover, respondent's references to the factors considered by the Fourth Circuit serve only to emphasize the *de novo* nature of those factors and the complete lack of opportunity afforded Firestone to brief and argue the relevance of those factors. Nothing in the prior mandamus records, let alone the instant record, justified the Fourth Circuit's consideration of the *present* convenience of the parties and witnesses or of the *present* availability of trial proceedings in Ohio. The unmitigated conjecture that permeates the opinion below underscores the denial of fair appellate procedure involved in the Fourth Circuit's blatant rejection of the *Platt* principles.

2. General Tire represents that it has suits "pending in Cleveland against U.S. Rubber Company . . . The B. F. Goodrich Company, Carroll Tire, Inc., and

The Mohawk Rubber Company" (R. Br. 11)—but there has been *no* discovery in the Goodrich or Mohawk cases, which were not filed until 1967, or in the Carroll case.[1] Nor has discovery as yet been *completed* even in the U.S. Rubber litigation. Obviously the Baltimore case, with its massive three-year record, simply cannot be consolidated with the Cleveland suits. Consolidation is possible only if Firestone is forced to start anew in Ohio.

3. Civil Action 12,932 is not "an essentially simple patent case" (R. Br. 5), as General *now* represents.

The truth is that General intends domination of the entire domestic passenger tire industry by its patent 2,964,083—and domination of the same industry in the balance of the free world by twenty-two counterparts of the same patent. But the complexities of the case and the public interest in the result are in no sense measured solely by patent parameters.

The "invention" of the patent in suit was allegedly made while General was a participant in the government synthetic rubber (Rubber Reserve) program on

---

[1] Carroll was joined as a codefendant with McCreary in a 1961 suit belatedly filed by General in Ohio to frustrate the Firestone and McCreary litigation in Maryland. Prosecution of the McCreary-Carroll case in Ohio was enjoined by Judge Watkins on July 6, 1961, and the injunction was not lifted until September 1966, subsequent to the independent McCreary settlement on July 18, 1966.

The Goodyear settlement was a "bet" upon the outcome of the Maryland litigation involving Firestone. Goodyear agreed to pay General two million dollars on the understanding that one million would be refunded if Firestone prevailed in Baltimore, but that a third million would be paid to General if Firestone lost.

General also undertook to license or sue Goodrich within one year of the settlement date. The newly-filed Goodrich case is understood to be the result.

which several hundred million dollars of public funds were expended during the 1942-1955 time period. A central issue in the Maryland litigation is whether Firestone enjoys a worldwide royalty-free license to use the subject matter of patent 2,964,083 by operation of a research agreement consummated as of January 1, 1949 between General and the Reconstruction Finance Corporation—a research agreement pursuant to which General Tire was paid some millions of dollars of public monies.[2] If Firestone is right in its contention that the patent in suit is licensed by the General research contract, all major domestic tire producers will enjoy a worldwide royalty-free right under patent 2,964,083 by operation of the same contract.

This contract-license issue may well be dispositive of the whole of the Maryland case—and its resolution in Maryland in favor of the asserted license will be binding on Respondent General in Ohio and dispositive of the litigation in that forum as well.[3] Judge Watkins and Judge Watkins alone can properly and fairly resolve this dispositive issue in view of the death or

---

[2] Paragraph 9(b) of the amended complaint states in pertinent part:

> "9. United States patent 2,964,083 is not infringed by Firestone because
>
> * * *
>
> "(b) Firestone has a worldwide royalty-free license under any information disclosed in and the alleged invention covered by the said patent and any and all foreign counterparts thereof, *inter alia*, because:
>
> * * *
>
> "(3) General entered into an agreement with RFC dated January 1, 1949, a copy of which is attached to the original complaint as Exhibit A . . ."

[3] In Cleveland, Goodyear and U.S. Rubber alleged noninfringement on the basis of the same license agreement.

present unavailability of many of the key witnesses who have testified before him. And, as noted in the Petition (Pet. 23, note 19), if the patent is held *invalid* in Maryland, General would have no right to a second trial of the validity issue in Ohio in any event. See *Nickerson* v. *Pep Boys—Manny, Moe and Jack*, 247 F. Supp. 221 (D. Del. 1965). Thus, even the interest of "judicial economy" which the Fourth Circuit Court of Appeals found paramount in ordering transfer is not served by transfer at all—but only by a prompt decision by Judge Watkins in C.A. 12,932.

The public interest which attends all patent litigation hence applies with particular force to demand immediate completion of the Baltimore trial. The grant of certiorari is essential to insure that Firestone's challenge to the enforceability of patent 2,964,083—a challenge that " 'is not only a private right to the individual, but it is founded on public policy which is promoted by his making the defence, and contravened by his refusal to make it.' " *Katzinger* v. *Chicago Metallic Mfg. Co.*, 329 U.S. 394, 401, 91 L. Ed. 374, 379 (1947) [quoting *Pope Mfg. Co.* v. *Gormully*, 144 U.S. 224, 235, 36 L. Ed. 414, 418, 12 S. Ct. 632 (1892)]—is not now contravened, on the eve of judgment.

4. A far more fundamental question and one of transcendent importance is implicit in these proceedings. Basically the issue is whether the rule of law is vulnerable to the repeated use, as a trial tactic of ill-founded charges of fraud, bias and bad faith launched without scruple not only against an opposing party, its counsel and its witnesses, but against the trial judge as well. *Cf. In Re Woodmar Realty Company*, 294 F. 2d 785, 792, 795 (7 Cir. 1961); *Gallo* v. *Hirst*, 332 F. 2d 178, 179 (4 Cir. 1964).

Contrary to the representations of Respondent (R. Br. 3, 4), the pretrial procedures were difficult and the trial lengthy not because of any laxity on the part of Judge Watkins but rather as a direct consequence of the practices of General and its counsel. Judge Watkins was nearing the end of the unnecessarily long and complex trial over which he had presided with utmost objectivity and under the most difficult circumstances for almost three years when the writ of mandamus was issued on January 11, 1967. The commendable patience which Judge Watkins has exercised throughout these trying proceedings is best illustrated by a succinct review of General's vacillating conduct before him.

Not only did General fail to seek timely appellate review of the July 6, 1961 decision of Judge Watkins denying transfer—it proceeded for more than two years to prepare actively for trial in the Baltimore court. Shortly after Mr. Merriam was first appointed chief trial counsel for General, he stated in a letter to Judge Watkins on January 3, 1963: "Defendant joins with plaintiffs in requesting an early trial *in this Court* on the issues of validity and infringement. . . ." In the same letter Mr. Merriam stated, "It is . . . my intention that the expression of Your Honor that the case be tried no later than *October* be fulfilled." As late as May 20, 1963, Mr. Merriam again confirmed his acceptance of the Maryland forum and Judge Watkins as well by requesting that the trial be postponed from October 1963 to January 1, 1964 because "I am sure I can be ready by then and I am certainly not sure I can be ready by October 7th."

But as the trial date approached, General had a complete change of heart, presumably occasioned by

dissatisfaction with Judge Watkins' pretrial rulings. A "renewed" motion for transfer was filed September 6, 1963 and denied October 14, 1963. While the consequent "transfer mandamus" was pending in the Fourth Circuit Court of Appeals, General filed its "Affidavit of Personal Bias and Prejudice" to disqualify Judge Watkins under 28 U.S.C. 144. In his memorandum rejecting the affidavit, Judge Watkins stated:

> ". . . Defendant's complaint largely seems to be that it was not permitted in its sole discretion to determine where and when the case should be tried, and where, when, by whom, and to what extent, discovery should be allowed or denied."

Having failed in its efforts to avoid trial before Judge Watkins through transfer or disqualification, General, on January 15, 1964, filed a baseless jury trial demand, having no counterpart in the Cleveland actions. In his answer to the ensuing "jury trial" mandamus, Judge Watkins stated:

> "The motions for a jury trial appear to be an attempted revival of the matters raised by the Affidavit of Personal Bias and Prejudice. . . . The motions appear to be dilatory in nature both with respect to their time of filing and their consequences even if granted. . . ."

On November 18, 1965, after about eighteen months of trial, General opportunistically seized upon the decision of the Third Circuit Court of Appeals in *Rapp* v. *Van Dusen,* 350 F. 2d 806 (3 Cir. 1965), in yet another specious attempt to disqualify Judge Watkins for "misconduct" incident his answers filed in the two preceding mandamus petitions.

While the ensuing "disqualification mandamus" was *sub judice* in the Fourth Circuit, Judge Watkins, on

April 26, 1966, conducted a hearing in which the matter of the tape recording reproduced in footnote 7 of the opinion below (Pet. App. 11a) was fully investigated. At the conclusion of the hearing General disdained Judge Watkins' invitation to request from him such relief as it might desire. Instead General proceeded directly to file inflammatory and ill-founded fraud charges in the appellate court. No reference was made by General to the April 26, 1966 hearing before Judge Watkins although Firestone adverted to it in reply. In its opinion on the disqualification mandamus, 363 F. 2d 87, 90, the appellate court directed General, if it intended to pursue these charges, to present them in the first instance to the trial court. It is these fraud charges which Judge Watkins found to be totally without merit—a finding which the Fourth Circuit Court of Appeals expressly and properly abstained from considering—which General now relies upon in this Court in justification of the "transfer" order (R. Br. Sec. 4, p. 12 *et seq.*).

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

EDWARD S. IRONS
1000 Connecticut Avenue
Washington, D. C.
*Attorney for Petitioner*

*Of Counsel:*

STANLEY M. CLARK
1200 Firestone Parkway
Akron, Ohio